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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re EDWIN P., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWIN P.,

Defendant and Appellant.

G052488

(Super. Ct. No. DL044119)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Donna Crandall, Judge. (Retired judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

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Minor Edwin P. (Edwin) appeals from the order of the juvenile court on a petition brought pursuant to Welfare and Institutions Code section 602. He argues there was insufficient evidence to find that he received a stolen vehicle, did so for the benefit of a street gang, and committed the substantive street terrorism offense. In a supplemental brief, he argues the enactment of Proposition 47 requires, at a minimum, the stolen vehicle count to be reduced to a misdemeanor and the street terrorism offense to be dismissed.

We find there is sufficient evidence to support the true findings on both charges and the gang enhancement. We also conclude that because Proposition 47 does not apply to the offense of receiving a stolen vehicle, it is not relevant here.

## I FACTS

At the time the current petition was filed, Edwin had already been declared a ward of the court and was on supervised probation.<sup>1</sup> The current petition, filed in May 2015, was the seventh filed in this case. It alleged Edwin had committed the following offenses: unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a), count one); receiving stolen property (Pen. Code, § 496d, subd. (a),<sup>2</sup> count two); street terrorism (§ 186.22, subd. (a), count three); driving without a valid license (Veh. Code, § 12500, subd. (a), count four); resisting or obstructing an officer (§ 148, subd. (a)(1), count five); and driving with a blood-alcohol level of .01 percent or greater while under the age of 21 (Veh. Code, § 23136, subd. (a), count six). It was further alleged Edwin had committed counts one and two for the benefit of, or in association with, a criminal street gang with

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<sup>1</sup> Edwin was just over 18 years old at the time.

<sup>2</sup> Subsequent statutory references are to the Penal Code unless otherwise indicated.

the intent to promote, further or assist in the gang members' criminal conduct. (§ 186.22, subd. (b)(1).)

On January 16, 2015, Fullerton Police Officer Nicholas Dempkowski was on patrol when he saw a white two-door Honda Accord speeding down a street with approximately four to five Hispanic males inside. He turned around and followed the Honda. As he drove, he ran the license plate and the vehicle came back as stolen.

The vehicle first sped up, then stopped, "almost like a double-park situation." The details are somewhat ambiguous, but the occupants of the vehicle began to exit the vehicle shortly after it stopped. Before exiting, the two front seat occupants, with the doors open, were in the vehicle as if they were trying to retrieve something from the console before exiting. Edwin was the person who exited from the driver's seat. Edwin was wearing jeans, white shoes, and a blue hoodless sweatshirt with printing in white on the front. This mode of dress was consistent with Baker Street gang attire.

Dempkowski exited his own vehicle and yelled, "Police. Show me your hands." All the vehicle's occupants, except one, fled on foot. Dempkowski sent out a radio call to other officers in the area, providing a description of Edwin. The individual still in the vehicle was Gabriel Jimenez, a documented member of the Baker Street gang. Dempkowski approached Jimenez, who appeared intoxicated, and found a small amount of methamphetamine in his possession. Jimenez was arrested.

Officer Ryan Warner, who had set up a perimeter nearby, saw Edwin about 30 minutes later. Warner approached and told Edwin to sit down, but he refused to comply. After Edwin ignored multiple demands, Warner handcuffed him. Dempkowski went to Warner's location and identified Edwin as the driver.

Also detained that night was William Ashlock, another Baker Street gang member. He was uncooperative. A search found a shaved key in his possession that was later used to start the Honda. Ashlock was related to the owner of the car, Jeremy Henderson, and also had a paystub with Henderson's name on it at the time he was

searched. Dempkowski later stated Ashlock was not the driver he saw at the time the vehicle stopped.

Later investigation revealed that Ashlock was Henderson's cousin, lived with him for some time, and sometimes drove the Honda with Henderson's permission. A few weeks before the night in question, Henderson refused Ashlock permission to drive the vehicle. Henderson also kicked Ashlock out of the house. The Honda was stolen that night. Henderson did not know Edwin and had never given him permission to drive the vehicle.

At the jurisdiction hearing, Officer Kenneth Edgar testified as the prosecution's gang expert. He was familiar with the Baker Street gang. He described their territory, and the vehicle stop in this case took place just north of that territory. He also described their typical clothing and tattoos. Edwin has a tattoo consistent with the Baker Street gang tattoos. Based on his criminal history, tattoo, prior police contacts, and the locations and people he has been involved with in documented incidents, Edgar opined that Edwin was a Baker Street gang member. He stated the primary activities of the gang were assaults, weapons possession, vehicle theft, and robbery.

When presented with a hypothetical based on the facts of this case, Edgar stated the possession and unlawful taking of the vehicle benefitted the gang. It provided transportation that was not associated with the gang members. It also bolstered the gang's reputation and the reputation of the individuals who were "putting in work" for the gang. Even stealing a car when it is not intended for use in other crimes can benefit the gang member's reputation. He also testified that gang members mostly commit crimes together, and share in the profits of those crimes.

At the close of evidence, the prosecution dismissed count six (minor's blood-alcohol level over .01 percent). The court, although it was "pretty sure" that Edwin was the driver of the vehicle, could not make that finding beyond a reasonable

doubt, and accordingly, dismissed counts one and four (unlawfully taking the vehicle and driving without a valid license).

The court then found the allegations true that Edwin had received a stolen vehicle, committed street terrorism, and resisted a peace officer (counts two, three and five). The court also found true the gang enhancement on the stolen vehicle allegation. Edwin was sentenced to 540 days of custody less time served, with his probation to terminate upon release from custody. Edwin now appeals.

## II

### DISCUSSION

#### *Substantial Evidence of Receiving a Stolen Vehicle*

“Our role in considering an insufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses [citation], and we review the record in the light most favorable to the judgment [citation], drawing all inferences from the evidence which supports the jury’s verdict. [Citation.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1382.) Before a verdict may be set aside for insufficiency of the evidence, a party must demonstrate “that upon no hypothesis whatever is there sufficient substantial evidence to support it.” (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *People v. Bolin* (1998) 18 Cal.4th 297, 331.) We neither reweigh nor resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) The standard of review is the same where the prosecution relies primarily on circumstantial evidence. (*People v. Miller* (1990) 50 Cal.3d 954, 992.)

Section 496d, subdivision (a) states, in relevant part: “Every person who buys or receives any motor vehicle . . . that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen . . . , . . . shall be punished by imprisonment . . . .” Thus, to sustain the petition on this count, the prosecution was required to prove (1) the vehicle was stolen; (2) the defendant knew it

was stolen; and (3) the defendant had possession of it. (*People v. King* (2000) 81 Cal.App.4th 472, 476.) “The requisite possession of the stolen property may be either actual or constructive, and need not be exclusive. In fact, physical possession is not required, as it is sufficient if the defendant acquires a measure of control or dominion over the stolen property. However, mere presence near the stolen property in and of itself is insufficient evidence of possession to sustain a conviction for receiving stolen property.” (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 728.)

Edwin first argues there was not substantial evidence to demonstrate he knew the vehicle was stolen. But there was strong circumstantial evidence to support such an inference. He was present on the night at the border of Baker Street gang territory in a vehicle with two other gang members. Ashlock had possession of a shaved key that later successfully started the vehicle, and he was the cousin of the owner of the stolen vehicle. Edwin also fled from the scene when the police officer approached. All of these facts, along with the testimony of the gang expert regarding gang habits, strongly support the inference that Edwin knew the vehicle was stolen.

Next, Edwin claims he did not have possession of the vehicle. While possession cannot be inferred from mere presence, additional facts can support an inference of possession. (*People v. Land* (1994) 30 Cal.App.4th 220, 228.) “[T]here is no single factor or specific combination of factors which unerringly points to possession of the stolen vehicle by a passenger. [T]he question of possession turns on the unique factual circumstances of each case.” (*Ibid.*) In *Land*, the court determined that from “the facts of appellant’s close relationship to the driver, use of the vehicle for a common criminal mission, and stops along the way before abandoning it (during which appellant apparently made no effort to disassociate himself from his friend or the stolen vehicle) a reasonable juror could infer appellant, as the passenger, was in a position to exert control over the vehicle. This inference, in turn, would support a finding of constructive possession.” (*Ibid.*)

Here, unlike the authority upon which Edwin relies, there was evidence that at least three Baker Street gang members were riding around in the vehicle. Vehicle theft was one of the gang's primary activities, and the gang expert also testified that such vehicles are used to commit crimes together and benefit the gang in multiple ways. Edwin fled from the vehicle after being stopped by police. Evidence of constructive possession can be “‘rather slight,’” and that low bar is easily cleared here. (*People v. Land, supra*, 30 Cal.App.4th at p. 225.) Edwin's presence, whether as a driver or passenger, when taken together with the other relevant facts, reasonably supported an inference of possession.

#### *Substantial Evidence Supporting the Gang Enhancement*

Edwin next contends the evidence was insufficient to support a true finding on the gang enhancement, section 186.22, subdivision (b)(1), in connection with the receiving a stolen vehicle count. The same standard of review discussed *ante* applies to section 186.22 gang enhancements. (*People v. Augborne* (2002) 104 Cal.App.4th 362, 371.) As we also discussed, our review of sufficiency of the evidence claims is quite limited. (*People v. Olguin, supra*, 31 Cal.App.4th at p. 1382.)

The California Street Terrorism Enforcement and Prevention Act (STEP Act; § 186.20, et seq.) criminalizes specified acts when committed in connection with a criminal street gang. It also provides for enhanced punishment for any misdemeanor or felony committed “for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .” (§ 186.22, subd. (b)(1).)

This enhancement has two essential elements: the crime must be committed for the benefit of, at the direction of, or in association with, a criminal street gang, and it must be committed with the intent to promote, further, or assist in criminal conduct by gang members. (*People v. Albillar* (2010) 51 Cal.4th 47, 55-56 (*Albillar*).)

The evidence supports the finding that both prongs are satisfied. First, the evidence demonstrated Edwin's receiving of the stolen vehicle was committed in association with one or more Baker Street gang members. Ashlock, in possession of the shaved key, and the cousin to the victim, was discovered nearby when Edwin fled from the scene. Jimenez, another Baker Street gang member, was also in the vehicle. The presence of other gang members creates an inference the crime was committed in association with a street gang. (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.)

With respect to the intent to promote, further or assist criminal conduct by gang members, the court had both evidence of the involvement of other gang members and the gang expert's testimony to rely upon. Evidence that Edwin was with other gang members is also evidence the crime was intended to promote, further or assist gang members' criminal conduct. (See *People v. Miranda* (2011) 192 Cal.App.4th 398, 413.) The gang expert testified that the vehicle was near Baker Street territory and the three known gang members were wearing clothing consistent with the gang's colors. He also testified about the nature of gang crimes and that vehicle theft was one of Baker Street's primary activities. Taken together, there was sufficient evidence for the juvenile court to conclude the crime was intended to promote, further or assist criminal conduct by gang members under section 186.22, subdivision (b)(1).

### *Substantial Evidence of Street Terrorism*

Edwin argues that the evidence is insufficient to support a true finding under section 186.22, subdivision (a), the street terrorism statute. Unlike the gang enhancement under section 186.22, subdivision (b)(1), the street terrorism offense is not a sentence enhancement, but a substantive crime. While similar to the enhancement, the language of the statute is slightly different.



Section 186.22, subdivision (a), provides: “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished . . . .”

Edwin again argues there was insufficient evidence that his actions promoted, furthered, or assisted the Baker Street gang. “The gravamen of the substantive offense set forth in section 186.22[, subdivision] (a)[,] is active participation in a criminal street gang. . . . Accordingly, the Legislature determined that the elements of the gang offense are (1) active participation in a criminal street gang, in the sense of participation that is more than nominal or passive; (2) knowledge that the gang’s members engage in or have engaged in a pattern of criminal gang activity; and (3) the willful promotion, furtherance, or assistance in any felonious criminal conduct by members of that gang. [Citation.] All three elements can be satisfied without proof the felonious criminal conduct promoted, furthered, or assisted was gang related.” (*Albillar, supra*, 51 Cal.4th at pp. 55-56.)

He raises two contentions on this point on the third element. The first is there was insufficient evidence of the underlying crime of receiving a stolen vehicle, a claim which we have already rejected. The second is there was insufficient evidence the felonious criminal conduct was committed by at least two gang members. (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1130.)

Edwin seems to believe this requires certainty as to who stole the vehicle or who was driving. We disagree. Edwin, as we have already discussed, had at least constructive possession of the vehicle. There was evidence beyond a reasonable doubt that Jimenez, one of the vehicle’s other occupants, was a member of the Baker Street gang. The gang expert testified with respect to the tendency of gang members to commit

crimes together and to use stolen vehicles for the benefit of the gang. Together with Jimenez's presence in the vehicle, this creates a strong inference that the stolen vehicle was being used to promote, further, or assist gang activities. There was also substantial evidence of Ashlock's involvement, both as a principal in the vehicle theft and as a member of the gang. Accordingly, the requirement of two gang members acting together was satisfied. Taken as a whole, we find the evidence sufficient to support the true finding on the street terrorism allegation.

#### *Proposition 47*

In a supplemental brief, Edwin argues that the true finding on receiving a stolen vehicle should be reduced to a misdemeanor under Proposition 47. This issue is currently pending review before the California Supreme Court. (See cases cited in *People v. Varner* (2016) 3 Cal.App.5th 360, 365, review granted Nov. 22, 2016, S237679.) In the absence of guidance from the Supreme Court, however, and as we have stated on numerous occasions, we continue to conclude that receiving a stolen motor vehicle in violation of section 496d is not an eligible offense under Proposition 47, and find that interpreting Proposition 47 to exclude section 496d is not an equal protection violation. (See *id.* at pp. 367, 370.)

III  
DISPOSITION

The order is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.